

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RON A. SPANGLER)	
Claimant)	
VS.)	
)	Docket No. 217,810; 217,811;
)	& 217,812
DILLON COMPANIES, INC.)	
Respondent)	
Self-Insured)	
)	

ORDER

Respondent appeals from a January 3, 1997 Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge ordered respondent to furnish claimant with medical treatment for his foot injury, but denied claimant's request for medical treatment for his abdominal problems and left hip injury. The Administrative Law Judge also denied temporary total disability compensation.

Claimant filed his application for preliminary medical and temporary total disability benefits in connection with the three separate injuries involved in these three docketed claims. Respondent appealed the issue of whether claimant gave timely notice of his left foot injury in Docket No. 216,812. Claimant raised the issues of whether he is entitled to additional medical treatment for his abdominal injuries and hip injury in Docket Nos. 217,810 and 217,811; and also whether claimant is entitled to temporary total disability compensation as a result of the three claimed work-related injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing as follows:

(1) Whether claimant gave respondent notice of his left foot accident as required by K.S.A. 44-520. The Appeals Board has jurisdiction to review an appeal from a preliminary

hearing order finding claimant gave proper notice of accident. See K.S.A. 1996 Supp. 44-534a.

K.S.A. 44-520 states:

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

In his form E-1 Application for Hearing, claimant alleges an aggravation to a preexisting foot injury during the period of June 1996 through August 11, 1996 as a result of continuous lifting, pulling skids and working on concrete. This claim was given Docket No. 217, 812. At the January 2, 1997 preliminary hearing, it was announced that claimant's last date worked was August 7, 1996 and that therefore claimant was alleging a series of aggravations to his left foot through August 7, 1996, his last date worked. Respondent denied the compensability of the left foot claim based upon claimant's failure to give timely notice that he was claiming that his left foot injury was work related.

Claimant testified that he reported to several supervisors that he was having problems with his left foot which he related to his job duties. Specifically, he named Bobby Smith, Dean Draper, Bob Hagemann, and Dave Tate as the persons he advised of his foot problems. Claimant testified that he related his left foot problems to his job duties.

Respondent presented the testimony of only Robert Hagemann, the assistant store manager. Mr. Hagemann acknowledged that claimant reported his foot condition to him, but denied that he related it to work at Dillons. Rather, according to Mr. Hagemann, claimant advised him that it was a work-related condition that happened at his prior job at the Wyandotte County Sheriff's Department. Accordingly, no injury report was filled out by respondent.

The other three supervisors to whom claimant stated he gave notice did not testify. Therefore, claimant's testimony that he gave timely notice to those individuals is uncontradicted. Evidence presented in a workers compensation case that is uncontradicted and not improbable, unreasonable, or shown to be untrustworthy, cannot be disregarded by the finder of fact. Generally, such uncontradicted evidence is regarded as conclusive. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

Because of the conflicting testimony as between claimant and Mr. Hagemann with regard to notice of a work-related accident, the credibility of these witnesses becomes an important consideration. The Administrative Law Judge apparently found claimant to be a credible witness because he awarded benefits based upon his testimony. In weighing the conflicting testimony and determining the respective credibility of the witnesses, the Appeals Board takes into consideration the Administrative Law Judge's opportunity to observe the witnesses testify. He had a unique opportunity to judge their demeanor and assess their credibility. Accordingly, the Appeals Board gives some deference to the findings and conclusions of the Administrative Law Judge in this regard.

Giving due deference to findings of the Administrative Law Judge together with the uncontradicted testimony by claimant that he related his foot injury to his work with respondent in giving notice to Mr. Smith, Mr. Draper, and Mr. Tate, the Appeals Board finds that at this point the preponderance of the credible evidence supports the conclusion that proper notice was timely given.

(2) Whether claimant is entitled to additional authorized medical treatment for his abdominal injury. In Docket No. 217,810 claimant alleges he injured his abdomen or abdominal area on December 10, 1995 while lifting a box at work. That injury was continually aggravated thereafter by the work claimant performed for respondent. Notice of the abdomen injury was timely reported and respondent provided authorized medical treatment for same. At regular hearing respondent denied that additional treatment was required for the December 10, 1995 work-related injury because claimant's current symptoms were not related to that incident. It appears, therefore, that respondent was disputing both the nature and extent of claimant's abdominal injury and also whether his current symptoms were caused by his work-related accident. As such, it appears that there was a disputed issue at preliminary hearing concerning whether claimant's present abdominal injury arose out of and in the course of his employment. This is an issue which is considered jurisdictional and subject to review by the Appeals Board. See K.S.A. 1996 Supp. 44-534a. However, it is not clear whether the Administrative Law Judge based his denial of additional medical treatment and temporary total disability compensation upon a finding that claimant's injury did not arise out of and in the course of employment with respondent. In his Preliminary Decision of January 3, 1997, the Administrative Law Judge found:

"On the other hand, a great deal of effort has been made by various physicians to identify the source of the claimant's abdominal problems and it has been variously described as musculoskeletal problem, or irritable bowel syndrome, or non-specific chronic colitis, none of which can be very closely

related to any kind of work condition. There is also some suggestion of hiatal hernia and reflux problems. (Upper GI contrast report, 6/14/96).

"Most of these problems, while they suggest a need for further medical treatment, do not indicate a necessity for the furnishing of such medical services by an employer as a result of a work related injury."

Following the January 2, 1997 preliminary hearing, claimant's counsel forwarded to the Administrative Law Judge a December 20, 1996 letter to claimant's counsel from a "Vicki Anderson, P.A." Vicki Anderson was referred to at the preliminary hearing as a doctor by claimant, but respondent raises a valid question as to her proper title as the report makes no reference to a medical degree and the "P.A." may refer to "physician's assistant." The Appeals Board understands the Administrative Law Judge's preliminary hearing order to constitute a finding that claimant failed to meet his burden of proof in Docket No. 217,810 that claimant's present abdominal problems are related to a work-related injury. Based upon a review of the medical records, including the December 20, 1996 report of Vicki Anderson, the Appeals Board agrees with the Administrative Law Judge in this regard.

(3) Whether claimant is entitled additional authorized medical treatment for his hip injury. In Docket No. 217, 811, claimant alleged a July 17, 1996 injury to his left hip when it was struck by a baler machine. At preliminary hearing, respondent did not deny the compensability of this injury. Instead, respondent argued that the left hip had been evaluated by a couple of physicians, including an orthopedic physician, and all had released claimant to return to work without restrictions. Respondent further stated that although claimant originally had some temporary restrictions, none of the physicians had taken him completely off work.

The Administrative Law Judge found as follows:

"Following a preliminary hearing on January 2, 1997, the various medical reports and records accumulated on Mr. Spangler during and after his employment at Dillon's grocery store in Shawnee were reviewed. These show a documented injury to the left hip which has apparently been considered by Dr. Wood and found substantially healed with a residual small knot which Dr. Wood expects to be eventually absorbed."

The Appeals Board concludes that the Administrative Law Judge declined to order further medical treatment for the left hip based upon a finding that such treatment was not necessary. This is not a finding which can be reviewed on an appeal from a preliminary hearing order. See K.S.A. 1996 Supp. 44-534a.

(4) Whether claimant is entitled to temporary total disability compensation as a result of the three claimed injuries. K.S.A. 1996 Supp. 44-534a(a)(2) provides in pertinent part as follows:

"Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge **may** make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim" (Emphasis added.)

The granting of temporary total disability benefits is not mandatory. Furthermore, whether claimant is entitled to temporary total disability benefits is not one of the issues considered jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary hearing order. Accordingly, the Appeals Board may not review this finding at this stage of the proceedings.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision order entered by Administrative Law Judge Robert H. Foerschler dated January 3, 1997 should be, and the same is hereby, affirmed as to issues Nos. 1 and 2 above and, the Appeals Board finds that it is without jurisdiction to review issues Nos. 3 and 4.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

c: Terri Z Austenfeld, Overland Park, KS
Scott J. Mann, Hutchinson, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director